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8 UNITED STATES DISTRICT COURT
9 SOUTHERN DISTRICT OF CALIFORNIA
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11 NELDA ZAMIR, Individually and on
12 Behalf of All Others Similarly Situated,
13 Plaintiff,
14 v.
15 BRIDGEPOINT EDUCATION, INC., et
16 al.,
17 Defendants.

Case No.: 15-CV-408 JLS (DHB)

**ORDER: (1) GRANTING
DEFENDANTS' MOTION TO
DISMISS; AND
(2) DISMISSING WITH PREJUDICE
PLAINTIFFS' THIRD AMENDED
COMPLAINT**

(ECF No. 70)

18 Presently before the Court is Defendants Bridgepoint Education, Inc. and Daniel J.
19 Devine's (collectively, "Defendants") Motion to Dismiss Plaintiffs' Third Amended Class
20 Action Complaint, ("MTD," ECF No. 70). Also before the Court are Plaintiffs' Response
21 in Opposition to, ("Opp'n," ECF No. 71), and Defendants' Reply in Support of, ("Reply,"
22 ECF No. 73), Defendants' Motion to Dismiss. Additionally, Plaintiffs filed a Request for
23 Judicial Notice, ("RJN," ECF No. 72), and Defendants' filed a Response to the Request for
24 Judicial Notice, (ECF No. 74). The Court vacated the hearing and took this matter under
25 submission without oral argument pursuant to Civil Local Rule 7.1(d)(1). (ECF No. 75.)
26 Having considered the parties' arguments and the law, the Court **GRANTS** Defendants'
27 Motion to Dismiss, (ECF No. 70).

28 ///

BACKGROUND

I. The Parties

Defendant Bridgepoint provides for-profit higher education through two wholly-owned subsidiaries, Ashford University and the University of the Rockies. (Third Am. Class Action Compl. (“TAC”), ECF No. 66, ¶¶ 3, 24.) Its common stock is publicly traded on the New York Stock Exchange. (*Id.* ¶ 25.)

Defendant Devine served as Defendant Bridgepoint’s Chief Financial Officer since January 2004 and its Executive Vice President since January 2011, resigning both positions on October 1, 2015.¹ (*Id.* ¶ 26.)

Plaintiffs Nelda Zamir and Thomas G. Prosch both purchased Bridgepoint common stock and options during the proposed Class Period between March 12, 2013 and May 30, 2014. (*Id.* ¶¶ 1, 23–24.) Plaintiffs seek to bring a class action on behalf of all other similarly situated purchasers of Bridgepoint securities. (*Id.* ¶ 1.)

II. Factual Background

Defendant Bridgepoint’s primary source of revenue is tuition and related fees. (*Id.* ¶ 3.) Without federal financial aid, many of Defendant Bridgepoint’s students would not choose to attend Bridgepoint’s institutions, nor could they pay the tuition these institutions charge. (*Id.* ¶ 33.)

In mid-2012, Bridgepoint experienced technical issues during an annual upgrade of its student management system. (*Id.* ¶ 67.) These technical issues resulted in delays in packaging students for financial aid qualification in between financial aid award years. (*Id.*) As a result, a significant number of students were not packaged prior to departing Bridgepoint’s institutions and were consequently not eligible for financial aid funding. (*Id.* ¶ 69.) These students were therefore required to pay outstanding balances without the assistance of financial aid. (*Id.*)

¹ The Parties filed a Joint Motion to dismiss, now former defendant, Defendant Andrew S. Clark from the action, which the Court granted, (ECF No. 65).

1 On March 12, 2013, Bridgepoint reported an increase in its bad debt expense for the
2 fourth quarter of 2012 and the 2012 fiscal year. (*See id.* ¶ 115.) Defendant Devine
3 explained to investors and analysts on an earnings conference call that Bridgepoint’s
4 technical issues were to blame, but that he did not expect the issue to repeat in 2013. (*Id.*
5 ¶ 68.) On May 17, 2013, Bridgepoint issued an amended Form 10-K for the 2012 fiscal
6 year to reissue its financial statements (“2012 Restatement”). (*Id.* ¶ 72.)

7 Despite Defendant Devine’s assurances to the contrary, the 2012 technical issues
8 caused a backlog in packaging financial aid throughout 2013. (*Id.* ¶ 70.) Consequently,
9 Bridgepoint continued to report higher than normal bad debt expenses as a percentage of
10 revenues. (*Id.* ¶ 13.)

11 On December 11, 2013, the United States Securities and Exchange Commission
12 (“SEC”) contacted Defendant Devine with comments and questions regarding
13 Bridgepoint’s declining enrollments but increased revenue for the 2012 fiscal year.² (*See*
14 Second Am. Compl. (“SAC”), ECF No. 57, ¶¶ 47, 65.) The SEC also asked Defendant
15 Devine how Bridgepoint’s internal processing issues with financial aid packages had
16 affected its bad debt percentage. (*Id.* ¶ 65.) Defendant Devine’s January 10, 2014 response
17 detailed Bridgepoint’s 2012 technical issues and the backlog affecting financial aid
18 packaging through 2013. (TAC ¶ 65.) In response to the SEC’s inquiry regarding
19 Bridgepoint’s determination that collectability is reasonably assured, Defendant Devine
20 noted that Bridgepoint “conclude[s its] collectability assessment based on the
21 government’s ability to pay as opposed to a student’s ability to pay.” (*Id.* ¶ 48.) Defendant
22 Devine’s response prompted the SEC to ask for additional information on February 12,
23 2014, including “why it is appropriate to base your collectability assessment on the
24 government’s ability to pay.” (*Id.* ¶ 50 (emphasis omitted).)

25 On March 11, 2014, Bridgepoint announced its preliminary fourth quarter and 2013
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28 ² Plaintiffs appear to omit this factual allegation from their TAC, but the Court references their SAC for the purpose of providing full background context.

1 fiscal year financial results in a press release. (*Id.* ¶ 131.) Later that day, Defendants held
2 an earnings call, during which Defendant Devine fielded questions relating to
3 Bridgepoint's increased bad debt percentage for the quarter. (*Id.*) Following this news,
4 the price of Bridgepoint's stock fell 15.73%, or \$2.99 per share, closing at \$16.02 per share
5 following unusually heavy trading volume. (*Id.* ¶ 145.)

6 On May 12, 2014, Defendants announced in a press release attached to a Form 8-K
7 that Bridgepoint would be unable to timely file its Form 10-Q for the first quarter of 2014
8 because "[t]he Company is working to quantify the impact of an outstanding comment the
9 Company received from the [SEC]." (*Id.* ¶ 147.) Defendants also explained that
10 Bridgepoint was evaluating whether to restate its financial results for the periods from
11 January 1, 2011 through December 31, 2013. (*Id.*) Defendant Devine held an earnings
12 conference call later that day, during which Defendant Devine admitted that Bridgepoint's
13 prior revenue recognition policy was incorrect. (*Id.* ¶ 148.) Specifically, Defendant Devine
14 explained that

15 [u]nder previous revenue recognition, revenues recognized subsequent to a
16 student losing financial aid eligibility, and ultimately not collected, were
17 included in our bad debt expense. Going forward, our policy will exclude
18 these revenues and will result in a corresponding decrease in our bad debt
expense that will be realized over subsequent quarters.

19 (*Id.*) Consequently, the price of Bridgepoint's shares declined nearly 9%, closing at \$14.51
20 per share after unusually heavy trading volume. (*Id.* ¶ 150.)

21 The following day, Defendant Devine filed a notification of late filing for the first
22 quarter of 2014 on Form 12b-25 with the SEC. (*Id.* ¶ 149.) This resulted in an additional
23 decline of 3.17% in Bridgepoint's share price, which closed at \$14.05 per share. (*Id.* ¶ 150.)

24 On May 30, 2014, Defendants announced that they were restating Bridgepoint's
25 financial results for the fiscal year ending December 31, 2013 and each of the three
26 quarterly financial results during the year, as well as revising the financial statements for
27 the fiscal years ending in December 31, 2012 and 2011. (*Id.* ¶ 152.) On June 2, 2014, the
28 first trading day following the press release, the price of Bridgepoint's shares declined by

1 1.31%, or \$0.17 per share, closing at \$12.82. (*Id.* ¶ 153.) Bridgepoint issued its restated
2 2013 financials on August 4, 2014 (“2014 Restatement”). (*Id.* ¶¶ 4, 36.)

3 As a result of the 2014 Restatement, Bridgepoint saw a decrease in revenues, but a
4 corresponding increase in net income and decrease in its bad debt expense:

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Financial Period	Original Revenue (millions)	Restated Revenue (millions)	Difference in Revenue	Original Net Accounts Receivable (millions)	Restated Net Accounts Receivable (millions)	Difference in Net Accounts Receivable
4Q 2012	\$209.4	\$206.5	(1.5%)	\$83.1	\$69.5	(19.6%)
FY 2012	\$968.2	\$943.4	(2.6%)	\$83.1	\$69.5	(19.6%)
1Q 2013	\$222.0	\$213.0	(4.1%)	\$83.9	\$66.5	(26.2%)
2Q 2013	\$197.6	\$193.4	(2.1%)	\$73.2	\$57.7	(26.9%)
3Q 2013	\$185.6	\$182.8	(1.5%)	\$63.1	\$55.5	(13.7%)
4Q 2013	\$163.5	\$162.2	(0.8%)	\$41.4	\$35.8	(15.6%)
FY 2013	\$768.6	\$751.4	(2.2%)	\$41.4	\$35.8	(15.6%)

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11 (*Id.* ¶ 38.)

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13 On July 25, 2014, Bridgepoint disclosed that the SEC was investigating its
14 accounting practices, including revenue recognition and receivables. (*Id.* ¶ 162.) The SEC
15 also issued a subpoena for the revised and restated time periods, and documents and
16 information dating back to July 1, 2009 to the present. (*Id.*) On July 12, 2016, via a Form
17 8-K filed with the SEC, Bridgepoint announced that the Department of Education would
18 commence a review of Ashford’s administration of federal student financial aid programs
19 for certain students identified in the 2009–2012 calendar year. (*Id.* ¶ 164.) In this same
20 Form 8-K, Bridgepoint also announced that the U.S. Department of Justice was conducting
21 an “investigation concerning allegations that the Company may have misstated Title IV
22 refund revenue or overstated revenue associated with private secondary loan programs and
23 thereby misrepresented its compliance with the 90/10 rule of the Higher Education Act.”
24 (*Id.* ¶ 165.)

25 Since their Second Amended Complaint, Plaintiffs state that the SEC released to
26 them, pursuant to a Freedom of Information Act request, two letters not previously
27 available. (*See id.* ¶ 46 n.6.) The first letter, dated February 28, 2014, from Defendant
28 Devine to the SEC, detailed Bridgepoint’s revenue process. This letter was sent before

1 Defendants' 2014 Restatement. Defendant Devine stated:

2 When a student decides to attend one of the Company's
3 institutions, the Company enters into an agreement with the
4 student to provide educational services. The student is the
5 responsible party under such agreement. The student has the
6 ability to seek other sources of funding (e.g., Title IV loans,
7 military benefits, or corporate funding) for the student's payment
8 obligations under the agreement, but the ultimate responsibility
9 for payment remains with the student. The Company believes
10 that it is important to emphasize that the contractual relationship
11 is between the Company and the student. The Company records
12 revenue by student and the accounts receivable is with each
13 student in the Company's student management system.

14 (*Id.* at 46 (footnote omitted); *see also id.*, Ex. A, ECF No. 66-1.) The second letter, dated
15 June 3, 2014, again from Defendant Devine to the SEC, summarized that "the Company
16 has determined that the failure to reassess collectibility upon certain changes in
17 circumstances [when recognizing revenue] has caused its financial statements for prior
18 periods to be materially misstated." (TAC ¶ 92; *see also* Ex. B., ECF No. 66-2.) In a
19 memo attached to the letter, Defendants admitted, "[w]hile judgment is involved in such
20 assessment, the measurement of the revenue that should have been recognized is capable
21 of precise measurement." (TAC ¶ 92.)

22 **III. Procedural Background**

23 Plaintiff Zamir filed an initial complaint on February 24, 2015, alleging two causes
24 of action for violation of Section 10(b) of the Exchange Act and Rule 10b-5 and violation
25 of Section 20(a) of the Exchange Act. (*See generally* ECF No. 1.) Plaintiffs moved for
26 appointment as lead plaintiffs and approval of choice of counsel on April 27, 2015. (*See*
27 ECF No. 3.) Because the motion was unopposed, (*see* ECF No. 13), the Court granted
28 Plaintiffs' motion, (*see* ECF No. 14).

On September 18, 2015, Plaintiffs filed the First Amended Complaint, asserting the
same causes of action as in the original complaint. (*See* ECF No. 17.) Several Defendants
filed motions to dismiss on November 24, 2015, (*see* ECF Nos. 28, 30), and on January 11,

1 2016, Plaintiffs filed a Motion to Strike, (*see* ECF No. 37). The Court granted Defendants’
2 motions to dismiss, and denied Plaintiffs’ Motion to Strike. (“First MTD Order,” ECF No.
3 53.) Thereafter Plaintiffs dismissed several named Defendants. (ECF Nos. 56, 59.)
4 Plaintiffs filed their Second Amended Complaint on September 9, 2016. (ECF No. 57.)
5 Defendants filed a motion to dismiss on October 24, 2016. (ECF No. 58.) The Court again
6 granted Defendants’ motion to dismiss. (“Second MTD Order,” ECF No. 64.) Plaintiffs’
7 Third Amended Complaint and Defendants’ Motion to Dismiss are now pending before
8 the Court.

9 **LEGAL STANDARD**

10 Federal Rule of Civil Procedure 12(b)(6) permits a party to raise by motion the
11 defense that the complaint “fail[s] to state a claim upon which relief can be granted,”
12 generally referred to as a motion to dismiss. The Court evaluates whether a complaint
13 states a cognizable legal theory and sufficient facts in light of Federal Rule of Civil
14 Procedure 8(a), which requires a “short and plain statement of the claim showing that the
15 pleader is entitled to relief.” Although Rule 8 “does not require ‘detailed factual
16 allegations,’ . . . it [does] demand more than an unadorned, the-defendant-unlawfully-
17 harmed-me accusation.” *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atl.*
18 *Corp. v. Twombly*, 550 U.S. 544, 555 (2007)). In other words, “a plaintiff’s obligation to
19 provide the ‘grounds’ of his ‘entitle[ment] to relief’ requires more than labels and
20 conclusions, and a formulaic recitation of the elements of a cause of action will not do.”
21 *Twombly*, 550 U.S. at 555 (citing *Papasan v. Allain*, 478 U.S. 265, 286 (1986)). A
22 complaint will not suffice “if it tenders ‘naked assertion[s]’ devoid of ‘further factual
23 enhancement.’” *Iqbal*, 556 U.S. at 677 (citing *Twombly*, 550 U.S. at 557).

24 In order to survive a motion to dismiss, “a complaint must contain sufficient factual
25 matter, accepted as true, to ‘state a claim to relief that is plausible on its face.’” *Id.* (quoting
26 *Twombly*, 550 U.S. at 570); *see also* Fed. R. Civ. P. 12(b)(6). A claim is facially plausible
27 when the facts pled “allow the court to draw the reasonable inference that the defendant is
28 liable for the misconduct alleged.” *Iqbal*, 556 U.S. at 677 (citing *Twombly*, 550 U.S. at

556). That is not to say that the claim must be probable, but there must be “more than a sheer possibility that a defendant has acted unlawfully.” *Id.* Facts “‘merely consistent with’ a defendant’s liability” fall short of a plausible entitlement to relief. *Id.* (quoting *Twombly*, 550 U.S. at 557). Further, the Court need not accept as true “legal conclusions” contained in the complaint. *Id.* This review requires context-specific analysis involving the Court’s “judicial experience and common sense.” *Id.* at 678 (citation omitted). “[W]here the well-pleaded facts do not permit the court to infer more than the mere possibility of misconduct, the complaint has alleged—but it has not ‘show[n]’—‘that the pleader is entitled to relief.’” *Id.*

Where a complaint does not survive 12(b)(6) analysis, the Court will grant leave to amend unless it determines that no modified contention “consistent with the challenged pleading . . . [will] cure the deficiency.” *DeSoto v. Yellow Freight Sys., Inc.*, 957 F.2d 655, 658 (9th Cir. 1992) (quoting *Schriber Distrib. Co. v. Serv-Well Furniture Co.*, 806 F.2d 1393, 1401 (9th Cir. 1986)).

“Claims brought under Rule 10b-5 . . . must meet Federal Rule of Civil Procedure 9(b)’s particularity requirement that ‘[i]n all averments of fraud or mistake, the circumstances constituting fraud or mistake shall be stated with particularity.’” *In re Dura Pharms., Inc. Sec. Litig.*, 452 F. Supp. 2d 1005, 1016 (S.D. Cal. 2006) (alteration in original) (quoting Fed. R. Civ. P. 9(b); and citing *In re Daou Sys., Inc. Sec. Litig.*, 411 F.3d 1006, 1014 (9th Cir. 2005), *cert. denied*, 546 U.S. 1172 (2006); and *Yourish v. Cal. Amplifier*, 191 F.3d 983, 993 (9th Cir. 1999)). “In addition, in 1995, Congress enacted the Private Securities Litigation Record Act of 1995 (“PSLRA”) and altered the pleading requirements in private securities fraud litigation by requiring a complaint plead with particularity both falsity and scienter.” *Id.* at 1016–17 (internal quotation marks omitted) (quoting *Daou Sys.*, 411 F.3d at 1014).

ANALYSIS

As before, Plaintiffs assert two causes of action: (1) violation of Section 10(b) of the Exchange Act and Rule 10b-5 against all Defendants, and (2) violation of Section 20(a) of

the Exchange Act against Defendant Devine. (See TAC ¶¶ 181–95.) Defendants ask the Court to dismiss Plaintiffs’ Third Amended Complaint with prejudice. (See MTD 10.)

I. Section 10(b) and Rule 10b-5

“Section 10(b) of the Securities Exchange Act of 1934 forbids (1) the ‘use or employ[ment] . . . of any . . . deceptive device,’ (2) ‘in connection with the purchase or sale of any security,’ and (3) ‘in contravention of’ Securities and Exchange Commission ‘rules and regulations.’” *Dura Pharms., Inc. v. Broudo*, 544 U.S. 336, 341 (2005) (quoting 15 U.S.C. § 78j(b)). “Commission Rule 10b-5 forbids, among other things, the making of any ‘untrue statement of a material fact’ or the omission of any material fact ‘necessary in order to make the statements made . . . not misleading.’” *Id.* (quoting 17 CFR § 240.10b-5 (2004)). “The basic elements of a Rule 10b-5 claim, therefore, are: (1) a material misrepresentation or omission of fact, (2) scienter, (3) a connection with the purchase or sale of a security, (4) transaction and loss causation, and (5) economic loss.” *Daou Sys.*, 411 F.3d at 1014 (citing *Dura Pharms.*, 544 U.S. at 341–42). Defendants challenge the adequacy of Plaintiffs’ allegations concerning only the second element—scienter. (See MTD 5 n.1, 11; see also Opp’n 11.)

A. Scienter

A private securities plaintiff must “state with particularity facts giving rise to a strong inference that the defendant acted with the required state of mind.” 15 U.S.C. § 78u-4(b)(2). The “required state of mind” is “scienter,” i.e., “a mental state embracing intent to deceive, manipulate, or defraud.” *Ernst & Ernst v. Hochfelder*, 425 U.S. 185, 193 n.12 (1976); *In re Silicon Graphics Inc. Sec. Litig.*, 183 F.3d 970, 975 (9th Cir. 1999), *abrogated on other grounds by S. Ferry LP, No. 2 v. Killinger*, 542 F.3d 776 (9th Cir. 2008); *In re Peerless Sys., Corp. Sec. Litig.*, 182 F. Supp. 2d 982, 987–88 (S.D. Cal. 2002). “[T]he PSLRA requires plaintiffs to plead, at a minimum, particular facts giving rise to a strong inference of deliberate or conscious recklessness.” *Silicon Graphics*, 183 F.3d at 979; *In re Wet Seal, Inc. Sec. Litig.*, 518 F. Supp. 2d 1148, 1157 (C.D. Cal. 2007). Recklessness amounts to “an extreme departure from the standards of ordinary care, and . . . presents a

1 danger of misleading buyers and sellers that is either known to the defendant or is so
2 obvious that the actor must have been aware of it.” *DSAM Global Value Fund v. Altris*
3 *Software, Inc.*, 288 F.3d 385, 389 (9th Cir. 2002) (quoting *Hollinger v. Titan Cap. Corp.*,
4 914 F.2d 1564, 1569 (9th Cir. 1990)). To satisfy this pleading requirement, “the complaint
5 must contain allegations of specific ‘contemporaneous statements or conditions’ that
6 demonstrate the intentional or the deliberately reckless false or misleading nature of the
7 statements when made.” *Ronconi v. Larkin*, 253 F.3d 423, 432 (9th Cir. 2001); *In re Levi*
8 *Strauss & Co. Sec. Litig.*, 527 F. Supp. 2d 965, 988 (N.D. Cal. 2007). The Court must
9 consider competing inferences that could be drawn in favor of plaintiffs or defendants and
10 determine whether plaintiffs have pled a “strong inference” of scienter which is “cogent
11 and at least as compelling as any opposing inference of nonfraudulent intent.” *Tellabs,*
12 *Inc. v. Makor Issues & Rights, Ltd.*, 551 U.S. 308, 314 (2007).

13 Defendants argue that Plaintiffs fail to adequately plead scienter. (MTD 11–25.)
14 Plaintiffs’ Opposition brief advances three primary arguments to address the scienter
15 requirement. First, Bridgepoint’s collectability assessment was unreasonable; second,
16 Bridgepoint’s competitor’s assessed collectability at the time it was recorded; and third,
17 additional scienter allegations support Plaintiffs’ argument. The Court addresses each in
18 turn.³

19 1. Whether Defendants’ GAAP⁴ Violation Was Unreasonable

20 Plaintiffs begin by arguing that Defendants knew Bridgepoint’s collectability
21 assessment violated GAAP. (Opp’n 13.) This argument remains unchanged from the
22 Second Amended Complaint. In its prior Order, the Court agreed with Plaintiffs’
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24 ³ Although the Court addresses Plaintiffs’ three primary allegations individually, “it is cognizant of the
25 duty to conduct a holistic analysis of Plaintiffs’ scienter allegations. The flaws of the various allegations
26 must be exposed as part of the Court’s holistic analysis.” *Westley v. Oclaro, Inc.*, No. C-11-2448 EMC,
27 2013 WL 2384244, at *5 (N.D. Cal. May 30, 2013). Therefore, the Court also discusses the holistic
28 analysis at the conclusion of the Scienter section.

⁴ Generally Accepted Accounting Principles (“GAAP”). See, e.g., *Metzler Inv. GMBH v. Corinthian*
Colls., Inc., 540 F.3d 1049, 1056 (9th Cir. 2008).

1 awareness argument. Specifically, the Court concluded that

2 [a]t the very least, the plaintiff must present facts demonstrating that the
3 defendant was aware of the relevant GAAP principle and that this defendant
4 knew how that princip[le] was being interpreted. The plaintiff must then plead
5 facts explaining how the defendant's incorrect interpretation was so
6 unreasonable or obviously wrong that it should give rise to an inference of
deliberate wrongdoing.

7 (First MTD Order 13–14 (quoting *In re Medicis Pharm. Corp. Sec. Litig.*, No. CV-08-
8 1821-PHX-GMS, 2010 WL 3154863, at *5 (D. Ariz. Aug. 9, 2010) (“*Medicis Pharm.*”);
9 and citing *In re Medicis Pharm. Corp. Sec. Litig.*, 689 F. Supp. 2d 1192, 1204 (D. Ariz.
10 2009)); *see also* Second MTD Order 10 (same).) In its prior order, this Court determined
11 that Plaintiffs plausibly demonstrated that “Defendant Devine was ‘aware of the relevant
12 GAAP principle and that this defendant knew how that princip[le] was being interpreted.”
13 (Second MTD Order 11 (quoting *In re Medicis Pharm. Corp. Sec. Litig.*, 2010 WL
14 3154863, at *5).)

15 The Court then found that Plaintiffs failed to plead sufficient factual allegations, as
16 to the second element in *Medicis*, explaining how Defendants’ “incorrect interpretation
17 was so unreasonable or obviously wrong that it should give rise to an inference of deliberate
18 wrongdoing.” (*Id.* at 12 (quoting *Medicis Pharm.*, 2010 WL 3154863, at *5). Specifically,
19 Plaintiffs allegations in both their First and Second Amended Complaints were based on
20 “obviousness of the violations” rather than external auditors counseling against the practice
21 or that Defendants admitted or were aware the practice was improper. (*Id.* at 14 (citations
22 omitted).) This Court found such allegations insufficient because Plaintiffs only identified
23 a GAAP violation and argued that a “correct interpretation was simple or obvious.” (*Id.*
24 (quoting *Medicis Pharm.*, 2010 WL 3154863, at *5).)

25 Plaintiffs argue the two previously unavailable letters from Defendants to the SEC,
26 attached as exhibits to their Third Amended Complaint, meet the Court’s previous concern
27 that Defendants’ GAAP violation was so unreasonable or obviously wrong. (Opp’n 14.)
28 According to Plaintiffs, the new allegations satisfy the second prong of *Medicis*

1 *Pharmaceutical*: that Defendants’ interpretation of its revenue collectability assessment, in
2 which they assumed that all revenue would be paid by the government, rather than actually
3 performing a collectability assessment, is on its face both unreasonable and obviously
4 wrong, and thus rises to an inference of deliberate wrongdoing. (*Id.*) Plaintiffs advance
5 four arguments in support of their thesis: (1) Defendants admitted there was no actual
6 revenue collectability assessment at the time revenue was recorded, (*id.*); (2) Defendant
7 Bridgepoint violated its professed accounting policies, (*id.* at 16); (3) Defendant
8 Bridgepoint’s design of its accounts receivable system violated additional GAAP guidance,
9 (*id.* at 17); and (4) Defendants knew that students without financial aid had lower
10 collectability rates, (*id.* at 18). The Court discusses each in turn.

11 a. Whether Defendants Conducted a Revenue Collectability Assessment

12 Plaintiffs argue that Defendant Devine admitted to the SEC that Bridgepoint made
13 no revenue collectability assessment at the time revenue was recorded. (*Id.* at 14 (citing,
14 e.g., TAC ¶ 52 (“[T]he Company has not done a formal analysis to separate collection rates
15 of students with and without financial aid funding.”).) Instead, Plaintiffs suggest that
16 Defendants “immediately recognized . . . as revenue” tuition owed but not paid; “increased
17 accounts receivable; waited 121 days to ‘assess’ revenue collectibility; and, at 121 days,
18 robotically reserved any revenue still owed at rates of 60% and 85%. (*Id.* at 14–15 (citing
19 TAC ¶¶ 63–64).)

20 Defendants argue that Plaintiffs’ Third Amended Complaint and the two new letters
21 undermine Plaintiff’s argument because the cited paragraphs reveal, at most, that
22 Defendants had a revenue collectability assessment, but could have designed a better
23 accounts receivable system. (MTD 13.) For example, Plaintiffs describe a stratification of
24 accounts receivable into different “age” categories: accounts open 120 days or less and
25 accounts open more than 120 days. (Reply 7.) Plaintiffs also describe further stratification
26 of those accounts “older” than 120 days between two types: active—reserved at 60%—and
27 inactive—reserved at 85%. (*Id.* (citing Opp’n 14).) Thus, Defendants argue it was not the
28 case that they did nothing when it came to assessing revenue collectability; instead, they

1 suggest that their assessment system was a “convenient proxy” for whether tuition would
2 be collected. (*Id.* (quoting Opp’n 19).)

3 The parties also debate the significance of the Ninth Circuit’s decision in *City of*
4 *Dearborn Heights Act 345 Police & Fire Ret. Sys. v. Align Tech., Inc.*, 856 F.3d 605 (9th
5 Cir. 2017). Defendants contend the facts in *Align* support their position. In *Align*, the
6 plaintiffs alleged that defendants knowingly misreported the company’s goodwill in
7 violation of GAAP principles. (MTD 17.) Not only did the plaintiffs in *Align* allege the
8 misreporting of goodwill, but they could also point to statement of confidential witnesses
9 and considerable insider selling as evidence of the defendants’ scienter. (*Id.*) The Ninth
10 Circuit rejected the plaintiffs’ arguments and held that, at most, the defendants failed to
11 follow GAAP, but did not have requisite scienter. (*Id.*) Defendants here suggest that
12 Plaintiffs’ argument is even farther afield because Plaintiffs’ lack confidential witnesses
13 and insider selling. (*Id.*)

14 Plaintiffs believe Defendants’ reliance on *Align* is misplaced. Plaintiffs cite *Align*
15 for the proposition that “[t]o plead an inference of scienter in th[e] context of [GAAP
16 violations], a plaintiff must allege additional facts that call into question the manner in
17 which the corporation conducted its [collectability] analysis.” (Opp’n 15 (alterations in
18 original) (quoting *Align Tech.*, 856 F.3d at 621).) Plaintiffs contend that their allegations
19 go beyond the manner in which Bridgepoint conducted its analysis and show that
20 Bridgepoint’s “collectibility analysis at the time revenue is recorded was actually a
21 falsehood.” (*Id.* (citing *Alaska Elec. Pension Fund v. Adecco S.A.*, 371 F. Supp. 2d 1203,
22 1213 (S.D. Cal. 2005)).)

23 The Court cited the following standards in its prior order, but these principles
24 describe what GAAP requires in the scienter context. The “GAAP is not the lucid or
25 encyclopedic set of pre-existing rules that [Plaintiffs] might perceive it to be.” *Shalala v.*
26 *Guernsey Mem’l Hosp.*, 514 U.S. 87, 101 (1995). “There are 19 different GAAP sources,
27 any number of which might present conflicting treatments of a particular accounting
28 question.” *Id.* (citing Robert S. Kay & D. Gerald Searfoss, *Handbook of Accounting and*

1 Auditing: 1994 Update With Cumulative Index, ch. 5, at 6–7 (2d ed. 1993)). Consequently,
2 GAAP “tolerate a range of ‘reasonable’ treatments, leaving the choice among alternatives
3 to management.” *Thor Power Tool Co. v. Comm’r of Internal Revenue*, 439 U.S. 522, 544
4 (1979). The Ninth Circuit therefore recognizes that “the mere publication of inaccurate
5 accounting figures, or a failure to follow GAAP, without more, does not establish scienter.”
6 *DSAM*, 288 F.3d at 390 (quoting *In re Software Toolworks, Inc.*, 50 F.3d 615, 627 (9th Cir.
7 1994)). Violations of GAAP, “even significant ones or ones requiring large or multiple
8 restatements, must be augmented by other specific allegations that defendants possessed
9 the requisite mental state.” *In re Int’l Rectifier Corp. Sec. Litig.*, No. CV07-02544-
10 JFWVBKX, 2008 WL 4555794, at *13 (C.D. Cal. May 23, 2008) (collecting cases).

11 Plaintiffs allege that Bridgepoint conducted no revenue collectability assessment at
12 the time revenue was recorded. (Opp’n 14 (citing TAC ¶¶ 52, 63–64).) This statement
13 sweeps too broadly. Bridgepoint’s February 28, 2014 letter to the SEC is instructive as to
14 its revenue collectability assessment. Bridgepoint disclosed:

15 The Company has not done a formal analysis to separate
16 collection rates of students with and without financial aid
17 funding. The Company’s accounts receivable system does not
18 separate or categorize students with and without financial aid
19 funding. The Company has historically collected approximately
20 93% of revenue in cash each year since 2010. The Company’s
historical collection rates from students have been sufficient for
us to assert that collectability is reasonably assured.

21 (TAC, Ex. A, at 11.) The letter went on to state:

22 Historically, the Company has evaluated allowance for doubtful
23 accounts needs using a breakdown of students as active, currently
24 attending class, or inactive, meaning no longer enrolled in
25 courses or graduated, and their relative aging bucket. The
26 company monitors its accounts receivable aging by 30-day aging
27 buckets, however, for ease of presentation, the Company has
28 summarized its accounts receivable analysis into categories of
active and inactive, as well as agings of less than and greater than
120 days, which is the date at which the collection risk profile
increases as financial aid funding should have been received

1 prior to this time and, in turn, the Company considers an account
2 receivable to be delinquent.

3 (*Id.* at 12.) The import of Defendants’ revenue collectability assessment is that Bridgepoint
4 did not have a formal assessment to separate students with and without financial aid.
5 Instead, Bridgepoint used a proxy assessment: the company assessed the age of its accounts
6 receivable at the 120-day mark because, historically, the company knew that 120 days was
7 the latest point in time the federal government granted financial aid.

8 Far from presenting a situation where Defendants’ prior collectability assessment
9 was a falsehood or so unreasonable, this situation represents a “misapplication of
10 accounting principles.” *In re Worlds of Wonder Sec. Litig.*, 35 F.3d 1407, 1426 (9th Cir.
11 1994). Both parties rely on *Align Technology* to support their positions. The *Align* court
12 reaffirmed the Ninth Circuit’s holding that “a failure to follow GAAP, without more, does
13 not establish scienter.” 856 F.3d at 621 (quoting *In re Worlds of Wonder Sec. Litig.*, 35
14 F.3d at 1426). The parties’ positions on *Align* are not mutually exclusive: both agree that
15 Plaintiffs need something more than a GAAP violation. The only issue is whether Plaintiffs
16 allege sufficient additional facts to show something more. *See id.* (“To plead an inference
17 of scienter . . . , a plaintiff must allege additional facts that call into question the manner in
18 which the corporation conducted its [collectability assessment].”).

19 Here, Plaintiffs demonstrate that Bridgepoint’s collectability analysis violated
20 GAAP, but the factual allegations in the Third Amended Complaint are not as “cogent and
21 at least as compelling as any opposing inference of nonfraudulent intent.” *Tellabs*, 551
22 U.S. at 314. Instead, the more compelling inference from Plaintiffs’ allegations is that
23 Defendants made a good faith but mistaken attempt to account for students with and
24 without financial aid. Bridgepoint did so by using the 120-day mark as a proxy for students
25 with or without federal financial aid. The Court finds that Defendants’ revenue
26 collectability assessment was not so unreasonable as required to support an inference of
27 scienter.

28 ///

b. Whether Defendant Bridgepoint Violated Its Professed Accounting Policies

Plaintiffs argues that Bridgepoint’s policy was that each student was responsible for tuition payment. (Opp’n 16.) Defendant Devine’s February 28, 2014 letter to the SEC confirmed the policy. (*Id.* (quoting TAC ¶ 46 (“The student is the responsible party under such an agreement.”).) According to Plaintiffs, Bridgepoint considered the individual student as the unit of account. (*Id.*) From this premise, Plaintiffs contend Bridgepoint violated its internal policies when it came time assess revenue collectability. (*Id.* (citing *Provenz v. Miller*, 102 F.3d 1478, 1490 (9th Cir. 1996) (GAAP errors that violate an internal accounting policy also raise an inference of scienter); and *In re Scholastic Corp. Sec. Litig.*, 252 F.3d 63, 77 (2d Cir. 2001) (“[D]efendants’ asserted actions contrary to expressed policy. . . . can form the basis for proof of recklessness.”)).) The violation occurred because “Bridgepoint’s accounts receivable system was premised on the unrealistic assumption that every student who owned tuition and fees . . . was just waiting for federal financial aid.” (*Id.* (citing TAC ¶¶ 54, 63–64, 79).)

Defendants counter that Plaintiffs are factually incorrect; the Third Amended Complaint does not allege that Bridgepoint violated its own accounting policies, but rather that Bridgepoint followed its policies and those policies turned out to be incorrect under GAAP. (Reply 7 (citing TAC ¶¶ 50–54, 57–59, 61–66, 78–80).) Defendants also contend that Plaintiffs’ cited legal precedent, *Provenz*, is not on point because it is both pre-PSLRA pleading standard and reviewing a summary judgment as opposed to a motion to dismiss. To wit, a motion to dismiss pleading has a higher scienter requirement than summary judgment, (*id.* at 7–8 (citing, e.g., *Reiger v. Price Waterhouse Coopers LLP*, 117 F. Supp. 2d 1003, 1011 (S.D. Cal. 2000))), and the Ninth Circuit has indicated that *Provenz*’s “reasonable inference” standard has been statutorily overruled, (*id.* (citing, e.g., *In re Silicon Graphics Inc. Sec. Litig.*, 183 F.3d 970, 979 (9th Cir. 1999)).)

The Court agrees with Defendants that the Third Amended Complaint does not allege Bridgepoint violated its own policies, but only alleges that those policies were

1 incorrect. For example, Plaintiffs allege that Defendant Devine admitted the “Company
2 has not done a formal analysis to separate collection rates of students with and without
3 financial aid funding[, and the] Company’s accounts receivable system does not separate
4 or categorize students with and without financial aid funding.” (TAC ¶ 52.) That quote
5 summarizes the error in Bridgepoint’s accounting policy. There was no *formal* analysis of
6 students with or without financial aid. But, Bridgepoint did assess student collectability
7 using a proxy assessment. Further, students could provide other sources of funding besides
8 federal financial aid. Thus, Bridgepoint followed its policy, and admitted as much to the
9 SEC; however, the policy was incorrect.

10 Additionally, there is misalignment between the internal policy and the GAAP
11 violation. Plaintiffs suggest that the accounting policy was that the “student is the
12 responsible party” and that “the ultimate responsibility for payment remains with the
13 student.” (Opp’n 16 (quoting TAC ¶ 46).) Yet, this policy does not provide specific
14 accounting guidance. Plaintiffs conflate Bridgepoint’s general policy emphasizing its
15 contractual relationship with its students with the specific accounting policy at issue. Thus,
16 even if Defendants did not follow the spirit of holding the students as the responsible party
17 this does not lead to the inevitable conclusion that they should have assessed revenue
18 collectability on a student-by-student basis.

19 The Court finds that *Provenz* is not directly on point here. The precise concern
20 motivating the *Provenz* court could support an inference of scienter in similar cases, i.e.,
21 whether Bridgepoint violated its own internal policy for recognizing revenue. *See* 102 F.3d
22 at 1490 (citation omitted). Yet, an internal policy violation did not occur here and *Provenz*
23 is not controlling. Defendants faithfully followed their internal accounting policy until an
24 internal processing error occurred, the SEC inquired into Defendants’ policies, Defendants
25 recognized their error, issued two restatements, and modified their policy to conform to
26 GAAP. Therefore, the Court finds that Defendants did not violate an internal accounting
27 policy.

28 ///

1 c. Whether Defendant Bridgepoint's Design of Its Accounts Receivable
2 System Violated GAAP Guidance

3 Next, Plaintiffs point out that GAAP guides companies on how to conduct a
4 collectability assurance assessment. (Opp'n 17.) GAAP requires companies to keep track
5 of smaller groups of homogeneous customers when information is available to reasonably
6 estimate collectability. When information is not available or uncertain, GAAP provides
7 that some other method of recognizing revenue, like cash basis, should be used. (*See id.*)
8 Plaintiffs contend that Defendants are liable because they knew of the GAAP principles
9 and failed to separate students by financial aid status. (*Id.*) Further, when Defendants first
10 reviewed their accounts receivable and came up with a remediation plan to improve internal
11 controls relating to accounts receivable they were no longer ignorant of their failure to
12 separate students by financial aid funding source. (*Id.* at 17–18 (citing *In re Medicis*
13 *Pharm. Corp. Sec. Litig.*, 2010 WL 3154863, at *6–7; and *Reese v. Malone*, 747 F.3d 557,
14 571 (9th Cir. 2014), *overruled on other grounds by Align Tech.*, 856 F.3d at 616; and *Gelfer*
15 *v. Pegasystems, Inc.*, 96 F. Supp. 2d 10, 15–16 (D. Mass. 2000)).)

16 Defendants counter that they never were ignorant of GAAP principles; instead,
17 Defendants admit that they applied those principles incorrectly as those principles
18 pertained to student collectability assessments. (Reply 8.) Defendants also contend that
19 Plaintiffs' precedent is lacking. *Gelfer* is an out-of-circuit, pre-*Tellabs* case that applied a
20 mere recklessness standard to the scienter analysis. (*Id.* at 8 n.17.) Defendants distinguish
21 *Reese* because that case had specific falsehoods by the defendant that "bridged the
22 [scienter] gap" and no such allegations are present here. (*Id.* (citing *Reese*, 747 F.3d at
23 572).)

24 The Court addresses Plaintiffs' two contentions. First, Plaintiffs argue GAAP
25 requires identifying the smallest group of homogenous consumers and Defendants did not
26 do this for students with and without financial aid. Yet, Bridgepoint did stratify accounts
27 receivable based on active and inactive status and the age of the account. As discussed
28 elsewhere in this Order, *see, e.g., supra* p.15, this system was a proxy to separate students

1 based on whether they received federal financial aid. This information allowed
2 Bridgepoint to reasonably *estimate* collectability. Additionally, GAAP violations must be
3 augmented by other specific allegations. *See Int'l Rectifier*, 2008 WL 4555794, at *13.
4 Thus, Defendants used a proxy for the GAAP principle and, even though the principle itself
5 may have been violated, that alone is not enough for scienter.

6 Second, Plaintiffs allege it was “extremely unlikely” Defendants were ignorant
7 following the 2012 Restatement. (Opp’n 17.) Bridgepoint’s internal analysis conducted
8 prior to issuing the 2012 Restatement is not conclusive. In *Reese*, the defendant made a
9 detailed factual statement that contradicted important data to which she had access. *See*
10 747 F.3d at 572. Here, Plaintiffs point to Defendant Devine’s statement made during a
11 May 6, 2013 earnings calls where he said:

12 **We did a deeper analysis.** The issue that kind of caused the
13 spike so to speak is that, in our underlying data we use to build
14 our models, those models that certain credits applied to them
15 **from when a student would leave the institution** or receive a
16 credit for another reason. That created one version of kind of our
17 aging buckets, and then we made the decision that it may be more
appropriate if we kind of suppressed those credits and that
created another view of the aging buckets which we feel is more
appropriate.

18 (TAC ¶ 76.)

19 Defendant Devine’s statement is not a model of clarity to assess whether Bridgepoint
20 conclusively should or should not have been on notice to change its policy to assess
21 collectability on a student-by-student basis. Indeed, Defendants had an historical 93%
22 tuition collection rate in cash each year since 2010. (*Id.* ¶ 51.) Then, Defendants did a
23 deeper analysis and changed the way they analyzed students when they left an institution.
24 There are no particularized allegations that Defendants were on notice of the specific
25 problem of evaluating collectability on a student-by-student basis. Plaintiffs’ allegations
26 demonstrate Defendant recognized issues and attempted to correct them. Thus, Plaintiffs
27 have not established that Bridgepoint’s design of its accounts receivable system raises an
28 inference of scienter.

1 d. Whether Defendant Knew Students Without Financial Aid Had Lower
2 Collectability Rates

3 Finally, Plaintiffs argue that Defendant Devine acknowledged students without
4 financial aid have lower collection rates, but Bridgepoint never bothered to track those
5 rates. (Opp’n 18 (citing TAC ¶¶ 65–66).) Bridgepoint knew how to determine which
6 students had financial aid and also knew the rate at which to reserve revenue from students
7 without financial aid. (*Id.*) Plaintiffs summarize that Defendants’ knew

8 GAAP required separation of students with and without financial
9 aid; that Bridgepoint did not separate these students; that students
10 without financial aid are considerably less likely to pay financial
11 aid; and that the increase in the Bad Debt Percentage was due to
12 a spike in the number of students without financial aid, it was
unreasonable for Defendants to have continued with the status
quo, robotic recognition of all revenue.

13 (*Id.* at 19.) Plaintiffs also point to an internal memo, included in the February 28, 2014
14 letter, that purportedly acknowledges the reason why revenue was not reasonably
15 collectable was due to lack of financial aid. The memo stated:

16 In Q2 2013 it was determined that the tuition related to the
17 second or greater retake of a course is not reasonably collectible
18 due to financial aid shortfalls and, therefore, revenue is
19 recognized on a cash basis (~\$0.8 million reversed, and not
20 recognized as revenue, in Q3 2013, \$2.5 million 2013 YTD). As
such, related bad debt will not exist going forward.

21 (*Id.* (emphasis omitted) (quoting TAC ¶ 83).)

22 Defendants counter that they knew students without financial aid had lower
23 collectability rates and they accordingly raised their Bad Debt levels. (Reply 9.) The
24 “internal memo” cited by Plaintiffs shows that Defendants decided to change their
25 collectability analysis as a result of its experience. (*Id.* (citing Opp’n 14).) Thus, the memo
26 “describes a company that did a collectability analysis[,] which was responsive to changed
27 circumstances and experience.” (*Id.*)

28 Plaintiffs quote *S. Ferry LP #2 v. Killinger*, as stating “[w]hen the facts known to a

1 person place him on notice of a risk, he cannot ignore the facts and plead ignorance.” 687
2 F. Supp. 2d 1248, 1258 (W.D. Wash. 2009) (quoting *Makor Issues & Rights, Ltd. v.*
3 *Tellabs, Inc.*, 513 F.3d 702, 704 (7th Cir. 2008)). Plaintiffs do not explicitly identify the
4 risk, but the Court infers the risk as “students without financial aid are considerably less
5 likely to pay financial aid.” (*See* Opp’n 19.) And, when there was a spike in the number
6 of students without financial aid Bridgepoint had to increase its Bad Debt percentage. (*Id.*)
7 Yet, as Defendants point out, Bridgepoint was aware of the risk that students without
8 financial aid were less likely to pay. Bridgepoint reserved revenue at rates of 60 and 85%
9 for students with accounts “older” than 120 days, which was their “assumption that there
10 was no financial aid available for what was owed.” (*Id.*) While Defendants’ accounting
11 method was contrary to GAAP, Plaintiffs’ allegations demonstrate that Defendants were
12 aware, before the Restatements, that students without financial aid were less likely to pay
13 and set their reserve rates accordingly. Therefore, Plaintiffs fail to demonstrate how
14 Defendants awareness amounts to scienter.

15 The internal memo, attached to Bridgepoint’s February 28, 2014 letter to the SEC,
16 does not counsel a different finding. The internal memo describes Bridgepoint’s realization
17 in the second quarter of 2013 that “tuition related to the second or greater retake of a course
18 is not reasonably collectible due to financial aid shortfalls” and that revenue would be
19 recognized on a cash basis. (TAC, Ex. B, at 19.) The Court finds Defendants modified
20 their collectability analysis based on their practical experience. Defendants encountered
21 an issue and attempted to correct it. Plaintiffs have not demonstrated that Defendants
22 remained ignorant of the facts and pled ignorance. *See S. Ferry LP #2*, 687 F. Supp. 2d at
23 1258. Thus, the Court finds that Defendants’ knowledge that students without financial
24 aid had lower collection rates does not raise an inference of scienter.

25 2. Bridgepoint’s Competitors

26 Plaintiffs also draw a comparison between Defendant Bridgepoint and its
27 competitors. Plaintiffs point to the fact that Bridgepoint’s competitors properly assessed
28 the collectability of revenue at the time it was recorded and specifically considered the

1 individual student's ability to pay as part of that assessment. (Opp'n 20 (citing *Medicis*
2 *Pharm.*, 2010 WL 3154863, at *8 (considering competitor accounting for alleged GAAP
3 violations as part of scienter analysis)).) For example, the SEC surveyed the Apollo
4 Education Group and that company's revenue collectability assessment was conducted
5 prior to a student's class attendance and was based on various factors. (*Id.* (citing TAC
6 ¶ 160).) Plaintiffs suggest that Defendants do not have an adequate explanation as to why
7 they did not follow their competitors' lead. Instead, Defendants can only point to the fact
8 that the SEC encouraged an industry wide reassessment of collectability when a student's
9 circumstances change. (*Id.* (citing TAC ¶ 158).)

10 Plaintiffs also state that Defendants' prior motions to dismiss argued that reasonable
11 accountants could disagree over whether it was appropriate to address the collectability of
12 revenue from independent paying students. (*Id.* at 21 (citing Prior Order 15).) Then,
13 Plaintiffs filed their Third Amended Complaint illustrating that no other accountant in the
14 industry took a similar approach as Bridgepoint. Defendants appear to have withdrawn
15 their argument in their present motion. Thus, Plaintiffs conclude that Bridgepoint's
16 competitors knew they needed to undergo a collectability assessment for their students, the
17 collectability assessment is a relatively simple accounting principle, and the simplicity of
18 the accounting principle supports the inference of scienter. (*See id.* (citing *Backe v. Novatel*
19 *Wireless, Inc.*, 642 F. Supp. 2d 1169, 1187 (S.D. Cal. 2009)).)

20 Defendants argue that Plaintiffs mischaracterize their own complaint. The Third
21 Amended Complaint alleges that of the "at least ten other companies in the for-profit post-
22 education sector" the SEC contacted, a "majority of these competitors similarly did not
23 reassess collectability of revenue upon a change in a students' circumstances prior to SEC
24 correspondence." (Reply 5 (quoting TAC ¶¶ 157–58).) Defendant contend that they did
25 not abandon their argument that reasonable accountants could disagree as to collectability
26 assessments. In fact, they argue the Third Amended Complaint describes that
27 Bridgepoint's treatment of the collectability assessment was consistent with a majority of
28 companies in the industry. (*Id.*)

1 An alleged GAAP violation concerning a simple accounting procedure can be a
2 consideration as part of the holistic analysis. *See Backe*, 642 F. Supp. 2d at 1187; *see also*
3 *Okla. Firefighters Pension & Retirement Sys. v. IXIA*, 50 F. Supp. 3d 1328, 1364 (C.D.
4 Cal. 2014) (citing *In re Medicis Pharm.*, 2010 WL 3154863, at *5 (“The magnitude of the
5 error, however, is not the only consideration. Courts must also weigh the complexity or
6 simplicity of the relevant accounting standard.”)).

7 Here, it is clear that Bridgepoint’s competitors used different accounting procedures.
8 As Plaintiffs illustrate, the Apollo Education Group collected tuition prior to a student’s
9 attendance and used a variety of factors to evaluate its students including whether the
10 student had federal financial aid. (TAC ¶ 160.) American Public Education, Inc. explained
11 that it had five detailed criteria to evaluate students, including review of students with
12 patterns suggesting potential credit abuse. (*Id.* ¶ 159.) American Public Education also
13 stratified its accounts receivable based on students’ payment situations; these included
14 those who may be eligible for financial aid, students with deficits beyond the provided
15 financial aid, and those with no financial aid. (*Id.*) Finally, Capella Education Company
16 listed five factors and noted that for students that do not elect to receive federal Title IV
17 funding as their primary option, Capella would review relevant funding materials specific
18 to that individual. (*Id.* ¶ 161.) It also appears that Capella was the only cited competitor
19 that reassessed collectability when a student withdrew from a course, (*id.*), and Plaintiffs
20 allege that “the majority of [Bridgepoint’s] competitors similarly did not reassess
21 collectability of revenue upon a change in a students’ [sic] circumstances prior to SEC
22 correspondence.” (*Id.* ¶ 158.)

23 Plaintiffs’ comparisons to industry competitors illustrate that there was no common
24 standard for assessing the collectability of student debt. Each competitor approached the
25 debt collectability assessment in slightly different ways. This suggests that there was no
26 simple accounting procedure and Defendant Bridgepoint was not an outlier from its
27 competitors. Instead, these examples suggest there is room for disagreement on how to
28 assess collectability. Nor was Defendant an outlier when it came to reassessing

1 collectability when a student's circumstances changed. As both sides point out, the
2 majority of competitors did not reassess collectability when a student withdrew from a
3 course. (*See* Reply 5; TAC ¶ 158.)

4 The newly discovered letters in Plaintiffs' Third Amended Complaint illustrate that
5 Bridgepoint did stratify their accounts receivable. Bridgepoint stratified their accounts
6 receivable first, by active versus inactive students and second, by "30-day aging buckets."
7 (TAC, Ex. A., at 12.) Bridgepoint further disclosed in the February 28, 2014 letter to the
8 SEC that after 120 days the collection risk profile increases because federal financial aid
9 should have been received prior to 120 days. (*See id.*) Defendants then assigned
10 probabilities of not collecting the amounts owed at 60% and 85% rates. (*Id.* ¶ 80.)
11 Plaintiffs label the rates "as proxies for the risk that a student would be not paying amounts
12 owed without aid." (*Id.* ¶ 81.) The critical link is that Bridgepoint used the 120-day as a
13 proxy for whether students would or would not receive federal financial aid—the choice
14 was deliberate.

15 Thus, Bridgepoint did stratify their accounts receivable and its method was a proxy
16 for whether students were with or without financial aid. From this conclusion, the Court
17 finds that reasonable accountants could disagree as to how to assess collectability. Indeed,
18 Plaintiffs' Third Amended Complaint illustrates that different competitors did disagree on
19 assessment specifics. At the very least, there was no simple accounting procedure that
20 Defendants did not follow but the rest of the industry did follow. Thus, the Court finds
21 that this argument does not establish the requisite scienter.

22 3. *Additional Scienter Allegations*

23 Plaintiffs bring four additional arguments that they suggest support an inference of
24 scienter.

25 a. Whether Bridgepoint's Accounting Practices Allowed it to Manipulate Its 26 Revenue

27 Plaintiffs argue that Defendants' collectability assessment allowed Bridgepoint to
28 recognize revenues immediately without considering the actual likelihood of collecting

revenue from students without financial aid funding. (Opp’n 22 (citing TAC ¶ 88).) Plaintiffs point to Defendant Devine’s admission that the delay in reporting bad debt, i.e., after 120 days, allowed Bridgepoint’s “operational initiatives implemented in late 2012 aimed at reducing bad debt” to kick in. (*Id.* (quoting TAC ¶ 88).)

Plaintiffs also contend that the 120-day assessment scheme allowed Bridgepoint to meet revenue consensus in two out of five financial reports in Plaintiffs’ proposed class period. (*Id.*) Plaintiffs suggest that Bridgepoint would not have met its revenue consensus in 1st Quarter, 2013 or Fiscal Year 2013 and would have missed its revenue consensus by almost \$44 million in Fiscal Year 2012. (*Id.* (citing TAC ¶ 93).) Plaintiffs cite *In re Medicis Pharmaceutical Corp. Securities Litigation*, 2010 WL 3154863, at *9–10, for the proposition that Bridgepoint’s revenue management is a relevant consideration in the scienter analysis. Finally, Plaintiffs point to Defendant Devine’s statement in Bridgepoint’s Staff Accounting Bulletin (“SAB”) 99 that the revenue misstatements were material. (Opp’n 22 (citing TAC ¶¶ 92–93).) The Court considers the two arguments in turn.

First, Plaintiffs argue that Bridgepoint’s accounting method allowed it to immediately recognize revenue without considering the actual likelihood of collecting revenue. Plaintiffs’ Third Amended Complaint includes a table that compares the default rate of student debt before and after the Restatement.⁵ The default rate is calculated by taking the allowance amount over the gross accounts receivable. (TAC ¶ 90.) For example,

⁵

Original (as Reported as part of, and after, the 2012 Restatement) (thousands)		12/31/12	3/31/13	6/30/13	9/30/13	12/31/13
	Gross A/R ¹⁰	\$132,085	\$134,948	\$128,364	\$116,378	\$85,641
	Allowance	\$49,105	\$51,072	\$55,140	\$53,319	\$44,248
	A/R Net	\$83,070	\$83,876	\$73,224	\$63,059	\$41,393
As Restated (thousands)	Default Rate	37%	38%	43%	46%	52%
	Gross A/R	\$102,820	\$103,026	\$95,590	\$88,269	\$64,826
	Allowance	\$33,361	\$36,523	\$37,868	\$32,809	\$29,045
	A/R Net	\$69,459	\$66,503	\$57,722	\$55,460	\$35,781
Eliminated ¹¹ (thousands)	Default Rate	32%	35%	40%	37%	45%
	Gross A/R	\$29,265	\$31,922	\$32,744	\$28,109	\$20,815
	Allowance	\$15,654	\$14,549	\$17,272	\$20,510	\$15,203
	A/R Net	\$13,611	\$17,373	\$15,502	\$7,599	\$4,569
	Default Rate	53%	46%	53%	73%	73%

(TAC ¶ 89.)

1 in the third quarter of 2013 Defendants originally reported their gross accounts receivable
2 as \$116,378 and their allowance amount as \$53,319. Therefore, the default rate was 46%.⁶
3 After the 2014 Restatement, the adjusted gross accounts receivable was \$88,269 and the
4 allowance was \$32,809 resulting in a default rate of 37%. (*See id.* ¶ 89.) Finally, Plaintiffs
5 calculate the default rate for the revenue that was eliminated or removed by the Restatement
6 from the original. The Restatement for third quarter 2013 eliminated \$28,109 in gross
7 accounts receivable and an allowance of \$20,510 resulting in a default rate of 73%. (*Id.*)
8 These numbers represent a stratification of students between those with and without
9 financial aid. Put differently, the table represents a before and after snapshot: before
10 Bridgepoint revised its accounting practices and after it revised the practices and restated
11 its revenue positions. After Bridgepoint restated its positions, it determined that the default
12 rate for students with financial aid was 37% and the default rate for those without aid was
13 73%.

14 Defendants suggest that these default rates are not far off from the default rates it
15 assigned students before the 2014 Restatement. (*See* MTD 15.) As Plaintiffs allege and
16 Defendants concede, Bridgepoint reserved accounts receivable based on both aging and
17 activity. Thus, student accounts open between 0 and 120 days were given a 3% reserve
18 rate; active accounts greater than 120 days were reserved at 60%; and inactive accounts
19 greater than 120 days were reserved at 85%. (*See* TAC ¶ 63; MTD 15.) Defendants argue
20 that they used the 120-day mark as a “close proxy” for whether or not the government
21 would provide financial aid—after 120 days it was highly unlikely that the government
22 would provide aid. (MTD 15.)

23 The Court understands Plaintiffs’ argument as, had Bridgepoint reassessed on a
24 student-by-student basis it would have found default rates for its students without financial
25 aid ranging between 46% and 73%. (Opp’n 23 (“Put another way, the table shows that had
26 Bridgepoint properly ‘put the major problems in one bucket’ during the Class Period, ‘that
27

28 ⁶ \$53,319 / \$116,378 = .458 or 46%.

1 bucket [w]ould have high reserves.” (quoting MTD 11)).) Yet, Defendants already
2 reserved students beyond 120 days at rates of 60 and 85%. Thus, Defendants did, in fact,
3 consider the likelihood of collecting revenue from students without financial aid and the
4 rates were similar to or greater than the rates Plaintiffs calculated in their table. The bucket
5 identified by Plaintiffs had rates within the range of rates historically reserved by
6 Defendants. Thus, Plaintiffs’ argument is not persuasive.

7 Second, Courts may consider the alleged motive or purpose underlying a defendant’s
8 accounting violation. *In re Medicis Pharm.*, 2010 WL 3154863, at *9 (citing *In re*
9 *Hypercom Corp. Sec. Litig.*, No. CV-05-455-PHX-NVW, 2006 WL 726791, at *9 (D. Ariz.
10 Jan. 25, 2006)). Thus, when a defendant’s violation of accounting principles allows a
11 company to obtain a financial benefit or competitive advantage, court will generally find
12 some inference of scienter. *See Telabs*, 551 U.S. at 325. That conclusion is tempered in
13 part because “motive and opportunity alone are insufficient to show scienter at the pleading
14 stage[;]” however, those factors may “still be considered as circumstantial evidence” of
15 scienter. *Howard v. Everex Sys.*, 228 F.3d 1057, 1064 (9th Cir. 2000) (citing *In re Silicon*
16 *Graphics*, 183 F.3d at 977–79).

17 Plaintiffs allege that Bridgepoint’s accounting methodology had the benefit of
18 meeting its revenue consensus in various financial quarters. (Opp’n 22.) Bridgepoint
19 disclosed that its revenue recognition errors “were quantitatively significant.” (TAC ¶ 93.)
20 In Fiscal Year 2012, Bridgepoint missed its revenue consensus, but had Bridgepoint
21 assessed its revenue without error it would have missed revenue estimates by \$44 million—
22 more than double the amount it actually missed consensus. (*Id.*) Thus, it is plausible that
23 Bridgepoint derived tangible benefit from their erroneous accounting method. Given the
24 lack of any other factual allegations demonstrating motive, the allegations here are not
25 overly compelling. *See Or. Pub. Emps. Ret. Fund v. Apollo Grp. Inc.*, 774 F.3d 598, 609
26 (9th Cir. 2014) (“The case law indicates, therefore, that although overstatement of revenues
27 in violation of GAAP may support a plaintiff’s claim of fraud, the plaintiff must show with
28 particularity how the adjustments affected the company’s financial statements and whether

1 they were material in light of the company’s overall financial position.” (citing *In re Daou*
2 *Sys., Inc.*, 411 F.3d 1006, 1018 (9th Cir. 2005))). Thus, the Court will consider this factor
3 in its holistic analysis.

4 b. Whether Bridgepoint’s Reliance on Its Auditor Negates Scienter

5 Plaintiffs ask the Court to reject Defendants’ argument that the Third Amended
6 Complaint did not allege that scienter was negated in part because Bridgepoint’s
7 independent auditor did not counsel against Bridgepoint’s accounting practices. (*Id.* at 23
8 (citing MTD 12).)⁷ Plaintiffs go on to hypothesize as to what Bridgepoint’s independent
9 auditor would have counseled had the auditor been privy to the actual reserve rates alleged
10 in the Third Amended Complaint. (*See id.* (citing TAC ¶¶ 89–91) (“Had Bridgepoint’s
11 auditor actually seen the 73% reserve rates for these students, it is very likely there would
12 have been some sort of ‘counsel[ing] against’ the revenue recognition practices employed
13 by Defendants.”).)

14 In its Second Motion to Dismiss Order, the Court cited two cases discussing opinions
15 by external, independent auditors. (*See* Second MTD Order 14 & n.6.) First, *Metzler*
16 *Investment GMBH v. Corinthian Colleges, Inc.*, 540 F.3d 1049, 1069 (9th Cir. 2008), stood
17 for the proposition that an allegation that a defendant’s external auditor counseled against
18 an improper accounting practice could support an inference that the defendant knowingly
19 and recklessly engaged in that improper accounting practice. Second, the Court agreed
20 with Plaintiffs that a clean audit opinion “does not, *standing alone*, negate any otherwise
21 compelling inference of scienter” that a plaintiff’s pleading raises. *Okla. Firefighters*
22 *Pension & Retirement Sys.*, 50 F. Supp. 3d at 1365 n.183 (emphasis added). The Court
23 understands Defendants’ brief as arguing that the allegations in the Third Amended
24 Complaint did not meet the Ninth Circuit’s concern in *Metzler*.

25 Defendants do not argue that their independent auditor gave them a clean bill of
26

27
28 ⁷ The Court believes that Plaintiffs meant to cite Defendants’ Motion to Dismiss brief at page 10, according
to the CM/ECF pagination. The only references to an independent auditor are on page 10.

1 health that might inoculate them against any scienter allegation. The district court in
2 *Oklahoma Firefighters Pension & Retirement System* explained that, absent discovery,
3 there is no way to know what communications transpired between the defendant and its
4 independent auditor. 50 F. Supp. 3d at 1365 n. 183. *Oklahoma Firefighters* teaches that,
5 absent discovery, this Court would need to evaluate what an auditor was told and what, if
6 anything, was withheld from the auditor. Plaintiffs have not alleged facts to this end. Yet,
7 Plaintiffs invite the Court to speculate as to what Bridgepoint's independent auditor might
8 have concluded if the auditor had all the facts. The Court will not engage in unsupported
9 conjecture; the appropriate conclusions are that (1) Defendants are not suggesting an
10 independent audit inoculates them and (2) Plaintiffs have not alleged an auditor counseled
11 against Defendants' accounting practice. Neither conclusion alters the Court's analysis:
12 there is no support here for the scienter inference and no support that Defendants were
13 absolved due to an auditor.

14 c. Whether Bridgepoint Omitted Relevant Facts

15 Plaintiffs next argue that Defendant Bridgepoint's statements omitted a material
16 explanation as to when Bridgepoint recognized revenue; specifically, when and how it
17 assessed revenue collectability. (Opp'n 24 (citing TAC ¶¶ 44, 118–19, 134–35).) This
18 was a factor in *In re Medicis Pharmaceuticals* and Plaintiffs would have the Court make a
19 similar finding here. See 2010 WL 3154863, at *7–9. In the Third Amended Complaint,
20 Plaintiffs include excerpts from Bridgepoint's Fiscal Year 2012 and 2013 SEC Form 10-
21 K's. These two excerpts are exactly the same and describe Bridgepoint's revenue
22 recognition policies at the time. (See TAC ¶¶ 118, 134.) Plaintiffs also include the updated
23 revenue recognition policy published in Defendants' 2014 Restatement. (See *id.* ¶ 44.)

24 Plaintiffs are correct that “an omission in public statements of materials facts related
25 to the GAAP violations can also give rise to a strong inference of scienter in certain
26 circumstances. *Medicis Pharm.*, 2010 WL 3154863, at *7 (citing, e.g., *Malone v.*
27 *Microdyne Corp.*, 26 F.3d 471, 479 (4th Cir. 1994)). The relevant considerations are worth
28 quoting at length:

1 Hence, when a Defendant knowingly adopts a questionable or
2 tenuous accounting methodology and fails to disclose material
3 facts regarding that methodology to investors, an inference of
4 scienter may arise. In contrast, where a defendant fully discloses
5 its accounting methodology in a “transparent manner,” and the
6 methodology is later shown to violate GAAP, any inference of
7 scienter will be substantially tempered.

8 *Id.* (citing *Malone*, 26 F.3d at 479); *see also In re WatchGaurd Sec. Litig.*, No. C05-678J,
9 2006 WL 2038656, at *5–6 (W.D. Wash. Apr. 21, 2006) (finding that the plaintiffs’
10 allegations failed to support a strong inference of scienter where defendants had
11 “consistently disclosed” the accounting error on which a restatement was based because
12 the “blatant error had been committed . . . in open and notorious fashion for years”).

13 Here, Plaintiffs point to Defendants’ 2014 Restatement as disclosing material
14 information regarding Bridgepoint’s methodology that it previously did not disclose in its
15 FY 2012 and FY 2013 Form 10-K’s. This is not an accurate description of Defendants’
16 disclosures. The 2014 Restatement did include new descriptions about its accounting
17 methodology, but the new disclosure were prompted by the SEC’s inquiries and implicitly
18 recognized that their previous methodology violated GAAP. The Third Amended
19 Complaint alleged that on May 12, 2014, Bridgepoint admitted that it was evaluating
20 whether to restate its financial results due, in part, to the lack of student-by-student
21 reassessment of revenue. (TAC ¶ 34.) Plaintiffs then allege that Defendant Devine
22 explained during the May 12, 2014 earnings conference call:

23 Under previous revenue recognition, revenues recognized
24 subsequent to a student losing financial aid eligibility, and
25 ultimately not collected, were included in our bad debt expense.
26 Going forward, our policy will exclude these revenues and will
27 result in a corresponding decrease in our bad debt expense that
28 will be realized over subsequent quarters.

(*Id.* ¶ 35.) Defendant Bridgepoint then issued its Restatement which retrospectively
corrected its misstated revenue. (*See id.* ¶ 36.) The additions to Bridgepoint’s updated

1 recognition policy reflect the changes that Defendant Devine mentioned in his conference
2 call. Before, Bridgepoint did not conduct a student-by-student reassessment of revenue;
3 going forward, Bridgepoint would “reassess collectability throughout the period revenue
4 is recognized by the Company’s institutions, on a student-by-student basis.” (*Id.* ¶ 44.)

5 Thus, Defendants’ purported omissions in their public statements was not hiding
6 their “questionable or tenuous accounting method.” *In re Medicis Pharm.*, 2010 WL
7 3154863, at *7. Instead, it was an admission that Defendants had made an error and the
8 updated accounting policy recognized that Bridgepoint should have conducted a student-
9 by-student revenue reassessment. Far from supporting Plaintiffs position, this fact is
10 similar to a defendant who fully discloses its accounting methodology in a “transparent
11 manner,” and that methodology is later show to violate GAAP. *Id.* Thus, in Bridgepoint’s
12 February 28, 2014 response letter to the SEC, Bridgepoint disclosed the following:

13 Historically, the Company has evaluated allowance for doubtful
14 accounts needs using a breakdown of students as active, currently
15 attending class, or inactive, meaning no longer enrolled in
16 courses or graduated, and their relative aging bucket. The
17 company monitors its accounts receivable aging by 30-day aging
18 buckets, however, for ease of presentation, the Company has
19 summarized its accounts receivable analysis into categories of
20 active and inactive, as well as agings of less than and greater than
21 120 days, which is the date at which the collection risk profile
increases as financial aid funding should have been received
prior to this time and, in turn, the Company considers an account
receivable to be delinquent.

22 (TAC, Ex. A, at 12.) Thus, Defendants disclosed to the SEC its accounting method: it
23 stratified accounts receivable into inactive vs. active and less than vs. greater than 120 days.
24 In its June 3, 2014 letter to the SEC, Bridgepoint admitted that “[h]istorically, the Company
25 was not performing a reassessment of collectibility under such circumstances”—such
26 circumstances meant reassessing collectability on a student-by-student basis. (*Id.*, Ex. B,
27 at 6–7.) The Court finds Defendants were not hiding their questionable or tenuous
28 accounting method, but rather disclosed the erroneous method to the SEC and then changed

1 their assessment because it was in error.

2 d. Whether Plaintiffs’ Additional Allegations Support Scierter as Part of
3 Holistic Analysis

4 Finally, Plaintiffs argue that the SEC, Department of Education (“DOE”), and
5 Department of Justice (“DOJ”) are conducting investigations into Bridgepoint, which
6 supports a scierter inference. (Opp’n 24 (citing Prior Order 17).) Defendants attempt to
7 rebut this argument with a Request for Judicial Notice, (ECF No. 73-1).⁸ The Court agrees
8 with Plaintiffs that an SEC letter indicating the SEC does not intend to take enforcement
9 action cannot be construed as indicating that a party has been exonerated. (*See* ECF No.
10 74, at 3); *see also* 17 C.F.R. § 202.5(d).

11 Plaintiffs’ allegations regarding the DOE and DOJ investigations do not relate to the
12 accounting issue at the core of the Restatements. The DOJ investigation concerned
13 compliance with the 90/10 rule of the Higher Education Act. (*See* TAC ¶ 165 (“U.S.
14 Department of Justice was conducting an ‘investigation concerning allegations that the
15 Company may have misstated Title IV refund revenue or overstated revenue associated
16 with private secondary loan programs and thereby misrepresented its compliance with the
17 90/10 rule of the Higher Education Act.’”).) The DOE investigation concerned Ashford
18 University’s administration of federal student financial aid—not Bridgepoint’s accounting
19 procedures.

20 The Court finds Plaintiffs’ argument unconvincing. They cite no authority why the
21 existence of an investigation supports a scierter inference. Instead, several district courts
22

23
24 ⁸ Defendants’ Request for Judicial Notice is a letter from the SEC, dated June 15, 2017, indicating that
25 the SEC would not recommend an enforcement action against Defendants. Courts have noticed the
26 existence of similar letters. *See, e.g., Batwin v. Occam Networks, Inc.*, No. CV 07–2750 CAS (SHx), 2008
27 WL 2676364, at *2 n.3 (C.D. Cal. July 1, 2008) (citing *Pension Benefit Guar. Corp. v. White Consol.*
28 *Indus.*, 998 F.2d 1192, 1197 (3d Cir. 1993)). Plaintiffs oppose the request because the contents of the
SEC letter cannot be used as a defense in this litigation. (ECF No. 74, at 3.) The Court **GRANTS**
Defendants’ Request for Judicial Notice, (ECF No. 73-2), but the Court does not consider the contents of
the letter as relevant to the scierter analysis. *See In re Am. Apparel, Inc. Shareholder Litig.*, No. CV 10-
6352 MMM (JCGx), 2013 WL 174119, at *13 (C.D. Cal. Jan. 16, 2013).

1 have found the existence of an investigation, standing alone, insufficient to support
2 scienter. *See In re Maxim Integrated Prods., Inc. Sec. Litig.*, 639 F. Supp. 2d 1038, 1047
3 (N.D. Cal. 2009); *In re Hansen Natural Corp. Sec. Litig.*, 527 F. Supp. 2d 1142, 1162 (C.D.
4 Cal. 2007). The Court agrees with the cited opinions and finds that the existence of an
5 SEC investigation, standing alone, does not support Plaintiffs’ scienter argument. *See also*
6 *Am. Apparel*, 2013 WL 174119, at *13 (“[T]he existence or nonexistence of an SEC
7 enforcement action is of little help in assessing whether plaintiffs have alleged sufficient
8 facts to state a claim for violation of the securities laws.”).

9 Plaintiffs also urge the Court to consider Defendant Devine’s Sarbanes-Oxley
10 (“SOX”) certifications and allegations of internal control deficiencies. (Opp’n 24 (citing
11 TAC ¶¶ 136–38, 166–67).) Defendants argue that Plaintiffs’ allegations with respect to
12 the contents of Defendants’ SOX certifications in the Third Amended Complaint are
13 largely identical to those alleged in the previous two complaints. (MTD 18 (citing SAC
14 ¶¶ 113–15, 138–39)), which the Court found insufficient in its previous Order, (Second
15 MTD Order 17). Plaintiffs urge the Court to consider the allegations of SOX certifications
16 and internal control deficiencies along with Plaintiffs’ other allegations. (Opp’n 24–25.)

17 With respect to the false SOX certifications, “Sarbanes-Oxley certifications are not
18 sufficient, without more, to raise a strong inference of scienter.” *Zucco Partners, LLC v.*
19 *Digimarc Corp.*, 552 F.3d 981, 1004 (9th Cir. 2009) (quoting *Glazer Capital Mgmt., LP v.*
20 *Magistri*, 549 F.3d 736, 747–48 (9th Cir. 2008)). Moreover, “required certifications under
21 Sarbanes-Oxley . . . add nothing substantial to the scienter calculus . . . and do not make . . .
22 otherwise insufficient allegations more compelling by their presence in the same
23 complaint.” *Id.* at 1003–04. Because the Court finds Plaintiffs’ other allegations
24 insufficient, the Court gives no weight to Plaintiffs’ allegations concerning Defendants’
25 false Sarbanes-Oxley certifications.

26 ***B. Holistic Analysis***

27 Although none of Plaintiffs’ individual allegations concerning Defendants’ scienter
28 are availing, the Court must also “review ‘all the allegations holistically.’” *See Matrixx*

1 *Initiatives, Inc. v. Siracusano*, 563 U.S. 27, 48 (2011) (citing *Tellabs*, 551 U.S. at 326).
2 “The inquiry . . . is whether *all* of the facts alleged, taken collectively, give rise to a strong
3 inference of scienter.” *Tellabs*, 551 U.S. at 322–23. In *Tellabs*, the Supreme Court
4 instructed that “the inference of scienter must be more than merely ‘reasonable’ or
5 ‘permissible’—it must be cogent and compelling, thus strong in light of other
6 explanations.” *Id.* at 324.

7 Even viewed holistically, however, Plaintiffs’ allegations again do not give rise to a
8 strong inference of scienter that is at least as compelling as an inference of nonfraudulent
9 conduct. The Court previously found the holistic analysis did not support Defendants’
10 scienter. (*See* First MTD Order 20; Second MTD Order 18.) After the first Motion to
11 Dismiss Order, Plaintiffs removed allegations of insider trading, (*see* First MTD Order 16–
12 19). After the second Motion to Dismiss Order, Plaintiffs removed allegations concerning
13 a confidential witness’s statements that individual defendants were generally aware of the
14 day-to-day workings of the company. (*See* Second MTD Order 13 n.5.) Thus, each
15 iteration has fewer allegations to support the holistic analysis, with the exception of the
16 two letters.

17 In their Third Amended Complaint, Plaintiffs’ additional allegations concern two
18 previously unavailable letters from Defendants to the SEC. The February 28, 2014 letter
19 disclosed Bridgepoint’s prior accounting method, which violated GAAP. The June 3, 2014
20 letter described the new accounting method adopted by Bridgepoint, which would bring
21 the company into GAAP compliance. Neither letter reveals particular facts that give rise
22 to a strong inference. The most plausible, nonculpable explanation is that Defendants used
23 a proxy for student financial aid that did not fully comply with GAAP, but fully disclosed
24 the proxy until Defendants realized it was incorrect. Defendants then amended their
25 accounting methods to remove the proxy and devised a method to account for students on
26 a student-by-student basis. In light of this explanation, Plaintiffs’ holistic analysis is not
27 as compelling.

28 The Third Amended Complaint does not support an inference of scienter “that is

greater than the sum of its parts.” *Rubke v. Capitol Bancorp Ltd*, 551 F.3d 1156, 1165 (9th Cir. 2009) (citing *S. Ferry*, 542 F.3d at 784; and *Metzler*, 540 F.3d at 1049).

C. Loss Causation

In addition to scienter, Plaintiffs must also show loss causation. *Daou Sys.*, 411 F.3d at 1014. The Court previously concluded that Plaintiffs could plausibly establish loss causation. (Second MTD Order 19.) Defendants suggest that Plaintiffs’ loss causation allegations are identical to their Second Amended Complaint. (MTD 5 n.1.) Thus, neither party takes up the loss causation argument except that Defendants request the Court incorporate its loss causation argument by reference. (*Id.*) The Court agrees that Plaintiffs’ loss causation allegations are identical. (*Compare* TAC ¶¶ 139–53 *with* SAC ¶¶ 116–30.) Therefore, the Court finds no reason to depart from its previous holding—Plaintiffs’ allegations could plausibly establish loss causation. (Second MTD Order 19 (citing *Gilead Scis.*, 536 F.3d at 1057; and *Lloyd v. CVB Fin. Corp.*, 811 F.3d 1200, 1210 (9th Cir. 2016)).) However, in light of the Court’s scienter conclusion, this finding does not alter the outcome of Plaintiffs’ first cause of action.

The Court finds that Plaintiffs have not established Defendants’ acted with the requisite scienter. Plaintiffs’ first cause of action cannot prevail without proving the scienter element. Therefore, the Court therefore **GRANTS** Defendants’ Motion to Dismiss, (ECF No. 70), and **DISMISSES** Plaintiffs’ first cause of action.

II. Section 20(a)

“Section 20(a) of the Act makes certain ‘controlling’ individuals also liable for violations of section 10(b) and its underlying regulations.” *Zucco Partners*, 552 F.3d at 990. Specifically, Section 20(a) provides:

Every person who, directly or indirectly, controls any person liable under any provision of this chapter or of any rule or regulation thereunder shall also be liable jointly and severally with and to the same extent as such controlled person to any person to whom such controlled person is liable (including to the Commission in any action brought under paragraph (1) or (3) of

1 section 78u(d) of this title), unless the controlling person acted in
2 good faith and did not directly or indirectly induce the act or acts
3 constituting the violation or cause of action.

4 15 U.S.C. § 78t(a). “Thus, a defendant employee of a corporation who has violated the
5 securities laws will be jointly and severally liable to the plaintiff, as long as the plaintiff
6 demonstrates ‘a primary violation of federal securities law’ and that ‘the defendant
7 exercised actual power or control over the primary violator.’” *Zucco Partners*, 552 F.3d
8 at 990 (quoting *No. 84 Employer-Teamster Joint Council Pension Tr. Fund v. Am. W.*
9 *Holding Corp.*, 320 F.3d 920, 945 (9th Cir. 2003); and citing *Paracor Fin., Inc. v. Gen.*
10 *Elec. Capital Corp.*, 96 F.3d 1151, 1161 (9th Cir. 1996)). “Section 20(a) claims may be
11 dismissed summarily . . . if a plaintiff fails to adequately plead a primary violation of
12 section 10(b).” *Id.* (citing *In re VeriFone Sec. Litig.*, 11 F.3d 865, 872 (9th Cir. 1993); *In*
13 *re Metawave Commc’ns Corp. Sec. Litig.*, 298 F. Supp. 2d 1056, 1087 (W.D. Wash. 2003)).

14 Because the Court has dismissed Plaintiffs’ cause of action predicated upon
15 violations of Section 10(b), *see supra* section I, the Court **GRANTS** Defendants’ Motion
16 to Dismiss and **DISMISSES WITH PREJUDICE** Plaintiffs’ second cause of action
17 against Defendant Devine for violations of Section 20(a).

18 **III. Leave to Amend**

19 The Court must consider whether to grant leave to amend. In *Foman v. Davis*, 371
20 U.S. 178, 182 (1962), the Supreme Court provided the following guidance for district
21 courts to determine whether to grant leave to amend:

22 In the absence of any apparent or declared reason—such as
23 undue delay, bad faith or dilatory motive on the part of the
24 movant, repeated failure to cure deficiencies by amendments
25 previously allowed, undue prejudice to the opposing party by
26 virtue of allowance of the amendment, futility of amendment,
etc.—the leave sought should, as the rules require, be “freely
given.”

27 Not all factors are equal—“[p]rejudice is the ‘touchstone of the inquiry under rule 15(a).’”
28 *Eminence Capital, LLC v. Aspeon, Inc.*, 316 F.3d 1048, 1052 (9th Cir. 2003) (per curiam)

1 (quoting *Lone Star Ladies Inv. Club v. Schlotzsky's Inc.*, 238 F.3d 363, 368 (5th Cir. 2001)).
2 Absent prejudice, or a strong showing of any of the remaining *Foman* factors, there exists
3 a *presumption* under Rule 15(a) in favor of granting leave to amend. *Id.* (citations omitted).

4 The Ninth Circuit has stated that adherence to *Foman* and its progeny is especially
5 important in the context of the PSLRA. *See id.* In *Eminence Capital*, the Ninth Circuit
6 reversed a district court that denied leave to amend even though the plaintiffs had three
7 “bites at the apple.” *Id.* at 1053. The Circuit determined that the plaintiffs had not filed
8 three substantially similar complaints alleging substantially similar theories—“it [was] not
9 accurate to imply that plaintiffs had filed multiple pleadings in an attempt to cure pre-
10 existing deficiencies.” *Id.*

11 Here, Plaintiffs amended their complaint three times. Each prior order found that
12 Plaintiffs failed to “state with particularity facts giving rise to a strong inference that the
13 defendant acted with the required state of mind.” (First MTD Order 11–20; Second MTD
14 Order 9–18.) Plaintiffs did not amend their complaint to state different causes of action,
15 but rather amended the complaints to demonstrate a strong inference of scienter, as required
16 by the PSLRA and Rule 10b-5. Moreover, Plaintiffs removed allegations from their
17 complaints. After the first Motion to Dismiss Order, Plaintiffs removed allegations of
18 insider trading, (*see* First MTD Order 16–19). After the second Motion to Dismiss Order,
19 Plaintiffs removed allegations concerning a confidential witness’s statements that
20 individual defendants were generally aware of the day-to-day workings of the company.
21 (*See* Second MTD Order 13 n.5.) Thus, each iteration focused primarily on the scienter
22 issue and each iteration failed to develop factual allegations to support the scienter element.

23 Plaintiffs have repeatedly failed to cure their scienter deficiency. Unlike *Eminence*
24 *Capital*, Plaintiffs here have filed multiple pleadings in an attempt to cure the deficiency
25 identified by the Court regarding scienter. With the exception of the two additional letters
26 sent by Defendants to the SEC, no new factual allegations have come to light. The basic
27 facts have not changed throughout the amended complaints, despite the addition of the
28 letters. The letters confirm the basic facts of the case. The prejudice to Defendants alone

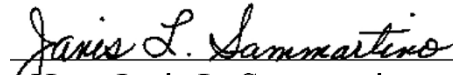
1 does not warrant denying leave to amend—a fourth round of amendments and motions
2 would impose the same burden as the prior iterations. However, Plaintiffs have failed to
3 cure the specific deficiency identified by the Court despite multiple opportunities to do so.
4 Failure to correct identified deficiencies “is a strong indication that the plaintiffs have no
5 additional facts to plead.” *Zucco Partners*, 552 F.3d at 1007 (quoting *In re Vantive Corp.*
6 *Sec. Litig.*, 283 F.3d 1079, 1098 (9th Cir. 2002), *abrogated on other grounds by Tellabs*,
7 551 U.S. 308). Therefore, the Court will deny leave to amend.

8 **CONCLUSION**

9 In light of the foregoing, the Court **GRANTS** Defendants’ Motion to Dismiss (ECF
10 No. 70). Accordingly, the Court **DISMISSES WITH PREJUDICE** Plaintiffs’ Third
11 Amended Complaint. (ECF No. 66.) This Order ends the litigation in this matter. The
12 Clerk of Court **SHALL** close the file.

13 **IT IS SO ORDERED.**

14 Dated: March 12, 2018


15 Hon. Janis L. Sammartino
16 United States District Judge
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